

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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9 STEVIE YATES, a minor child by his)
10 Guardian Ad Litem, STEPHANIE YATES,)
11 and STEPHANIE YATES and STEPHEN) 03:07-CV-00200-LRH-RJJ
12 YATES,)
13 Plaintiffs,)
14 v.)
15 WASHOE COUNTY SCHOOL DISTRICT,)
16 Defendant.)
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ORDER

16 WASHOE COUNTY SCHOOL DISTRICT, a)
17 political subdivision of the State of Nevada,)
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18 Cross-Appellant, and)
19 Counter-Claimant,)
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20 STEVIE YATES, a minor child by his)
21 Guardian Ad Litem, STEPHANIE YATES,)
22 and STEPHANIE YATES and STEPHEN)
23 YATES,)
24)
25)
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23 Cross-Appellee, and Cross-)
24 Defendants.)
25)
26)

1 Presently before the court is plaintiffs', Stevie Yates, Stephanie Yates, and Stephen Yates
 2 (collectively, "Plaintiffs"), Opening Brief on Appeal (# 32). Defendant Washoe County School
 3 District ("WCSD") has filed an answer (# 40) to which Plaintiffs responded (# 47) and replied (#
 4 45). WCSD subsequently replied (# 48) to Plaintiffs' response. Also before the court is Plaintiffs'
 5 Motion to Strike (# 46). Defendants have filed a response (# 49), and Plaintiffs replied (# 50).

6 **I. Factual and Procedural Background¹**

7 This is a civil action brought pursuant to the Individuals with Disabilities Education Act
 8 ("IDEA"), 20 U.S.C. § 1400 *et seq.* Stevie Yates ("Stevie") is a student at Reno High School who
 9 suffers from autism² and apraxia.³ *See* (Admin. R. at 22:3, 1398.) As a result of his conditions,
 10 Stevie has not been able to develop functional verbal skills. *Id.* at 1342. Thus, Stevie uses
 11 technological devises to communicate and meet his needs. *Id.* at 1342, 1632-1633, 1635. Stevie
 12 has made gains in his ability to communicate. *Id.* at 1652. "His ability to communicate with a
 13 variety of people and in a variety of contexts is emerging." *Id.*

14 Stevie has behavior issues that are addressed with the use of a Behavior Intervention Plan
 15 ("BIP"). *See id.* at 1523-25, 1668-70. The BIPs provide general information about Stevie, identify
 16 his behavioral problems, and provide instructions on how to respond. *Id.* Stevie's BIP dated
 17 January 19, 2005, indicates that Stevie is most successful in a positive environment that he is
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19 ¹The majority of factual allegations presented by Plaintiffs are not supported by any citation to the
 20 record. For example, Plaintiffs' points and authorities include an argument section that is virtually devoid of
 21 any citation to evidence that would support their position. It is not the role of this court to scour the record in
 22 search of evidence to support a parties' position. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764, 774-75
 23 (9th Cir. 2002) (citing *Huey v. UPS, Inc.*, 165 F.3d 1084, 1085 (7th Cir. 1999) ("[J]udges need not paw over
 24 the files without assistance from the parties.")). Thus, the court will only rely on those factual statements that
 25 are properly supported by the record.

26 ²Autism is a developmental disability that affects communication and social interaction. (Pls.' Opening
 27 Brief (# 32) at 5.)

³Apraxia is a motor disorder that prevents speech. (Pls.' Opening Brief (# 32) at 5; Admin. R. at 22:3.)

1 familiar with. (Admin. R. at 1523.)

2 Stevie was assessed to have below-average cognitive abilities. *Id.* at 1398, 1415. As a
3 result, Stevie participates in the Nevada Alternate Scales of Academic Achievement and is working
4 toward an adjusted diploma. *Id.* at 1445-52, 1655, 1664. Stevie has strong gross motor skills and
5 fine motor skills and is independent in completing self care tasks in the home environment. *Id.* at
6 1645, 1647.

7 Stevie's March 2005 Individualized Education Plan ("IEP") provides for quarterly
8 specialized progress reports and district report cards along with daily home notes or ongoing
9 communication log from his assistant. *Id.* at 1633. From February 4, 2005, to April 7, 2006, Stevie
10 has received progress reports indicating that he has either met an objective or was making progress
11 towards his goal. *Id.* at 1024-30, 1268-71, 1272-75, 1276-77.

12 During the 2004-2005 school year, Stevie received 88 percent of his education in the
13 general education setting. (Admin. R. at 917.) During the 2005-2006 school year, Stevie received
14 English instruction in a special education resource room because he was unable to receive an
15 educational benefit in a general education setting. *Id.* at 918. The remainder of the school day was
16 spent in regular education classrooms. *Id.*

17 The dispute in this case arose out of WCSD's proposed IEP dated April 5, 2006. (Appeal
18 (# 1) ¶ 15.) The April 5, 2006, proposed IEP provides that Stevie would spend 60 percent of his
19 day in the regular education environment. (Admin. R. at 918, 1641-1667.) Pursuant to the IEP,
20 Stevie would receive his English instruction, math instruction, and vocational instruction in the
21 special education environment. *Id.*

22 As a result of the proposed IEP, Plaintiffs filed a due process complaint alleging that
23 WCSD failed to offer Stevie a free appropriate public education ("FAPE") in violation of IDEA.
24 The Hearing Officer ("HO") issued her decision on December 22, 2006. *Id.* at 906. The HO
25 agreed Stevie should receive his math instruction in the special education resource room as
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1 opposed to a regular education classroom. *Id.* at 931. The HO also found Stevie was not denied a
 2 FAPE when his BIP was not included in the proposed April 2006 IEP. *Id.* at 935-37. The HO did
 3 find, however, that WCSD violated IDEA by failing to include a statement in the proposed IEP
 4 listing the particular assistive technology devices Stevie requires to receive a FAPE. *Id.* at 931-35.

5 Plaintiffs appealed the HO's decision, and WCSD filed a cross-appeal. A State Review
 6 Officer ("SRO") issued his decision on April 5, 2007. *Id.* at 1901. The SRO agreed with the HO
 7 that Stevie's receipt of math instruction in the special education resource room is consistent with
 8 IDEA's least restrictive environment mandate. *Id.* at 1921. The SRO reversed the HO on the issue
 9 of whether WCSD violated IDEA by not including the BIP in Stevie's IEP. *Id.* at 1922-28.
 10 Finally, the SRO affirmed the HO's finding that WCSD violated IDEA by failing to include a
 11 statement of particular assistive technology devices Stevie requires to receive a FAPE. *Id.* at 1938-
 12 40. This appeal was subsequently initiated on April 25, 2007. Plaintiffs appeal the SRO's decision
 13 that WCSD offered Steve a FAPE in the least restrictive environment. WCSD filed a cross-appeal
 14 challenging adverse rulings concerning the failure to include a list of assistive technology devices
 15 in the proposed IEP and the failure to include the BIPs with the IEP.

16 **II. Legal Standard**

17 IDEA was enacted "to ensure that all children with disabilities have available to them a free
 18 appropriate public education that emphasizes special education and related services designed to
 19 meet their unique needs and prepare them for further education, employment, and independent
 20 living." 20 U.S.C. § 1400(d). "An appropriate public education does not mean the absolutely best
 21 or potential-maximizing education for the individual child. . . . The states are obliged to provide a
 22 basic floor of opportunity through a program individually designed to provide educational benefit
 23 to the handicapped child." *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994) (citations
 24 and internal quotations omitted).

25 In case of a dispute between the school district and the parents, IDEA permits the parents of
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1 disabled children to “present a complaint . . . with respect to any matter relating to the
 2 identification, evaluation, or educational placement of the child, or the provision of a free
 3 appropriate public education to such child.” 20 U.S.C. § 1415(b)(6). The statute provides that a
 4 parent who submits such a complaint “shall have an opportunity for an impartial due process
 5 hearing.” 20 U.S.C. § 1415(f)(1)(A). IDEA further permits any party aggrieved by the finding and
 6 decision in the due process hearing to file a civil action in state or federal court. 20 U.S.C. §
 7 1415(i)(2). In any action seeking judicial review of the administrative decision, “the court . . . (i)
 8 shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the
 9 request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant
 10 such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(C).

11 Judicial review of a state hearing officer’s decision involves two steps. *Smith*, 15 F.3d at
 12 1524. “First, the court must determine whether the rigorous procedural requirements of IDEA have
 13 been met. Second, the court must determine whether the state has met the substantive component
 14 of IDEA - the requirement that the state provide an ‘appropriate’ education.” *Id.* (citing *Bd. of
 15 Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-07
 16 (1982)).

17 The standard of review to be conducted pursuant to IDEA has been described as a
 18 “modified *de novo* review.” *S.H. v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 270
 19 (3d Cir. 2003); *see also Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001)
 20 (“Complete *de novo* review . . . is inappropriate.”). This modified *de novo* review requires the
 21 district court to give “due weight” to the hearing officer’s decision. *Capistrano Unified Sch. Dist.
 22 v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995). This court cannot substitute its notion of sound
 23 educational policy for those of the school authorities. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d
 24 1467, 1472 (9th Cir. 1993). The amount of deference due to state educational agencies is a matter
 25 for discretion of the courts. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir.
 26

1 1987). However, “the amount of deference bestowed upon the hearing officer is increased where
 2 her findings are ‘thorough and complete.’” *Adams v. State of Oregon*, 195 F.3d 1141, 1145 (9th
 3 Cir. 1999) (quoting *Smith*, 15 F.3d at 1524). “The burden of proof in an administrative hearing
 4 challenging an IEP is properly placed upon the party seeking relief.” *Schaffer v. Weast*, 546 U.S.
 5 49, 67 (2005).

6 **III. Discussion**

7 **A. Least Restrictive Environment**

8 The primary issue in this case requires the court to determine whether a preponderance of
 9 the evidence supports the SRO’s decision that Stevie’s receipt of math instruction in the special
 10 education resource room is consistent with IDEA’s least restrictive environment (“LRE”) mandate.
 11 Plaintiffs argue the regular education classes are the LRE for addressing limited functional goals of
 12 money, time and measurement. WCSD, on the other hand, contends that Stevie will not receive a
 13 satisfactory education in such environment.

14 Pursuant to IDEA, children with disabilities are to be educated in the least restrictive
 15 environment. 20 U.S.C. § 1412(a)(5). Specifically, § 1412(a)(5) provides as follows:

16 To the maximum extent appropriate, children with disabilities, including children in
 17 public or private institutions or other care facilities, are educated with children who
 18 are not disabled, and special classes, separate schooling, or other removal of
 19 children with disabilities from the regular educational environment occurs only
 when the nature or severity of the disability of a child is such that education in
 regular classes with the use of supplementary aids and services cannot be achieved
 satisfactorily.

20 *Id.* Section 1415(a)(5) sets forth a preference for educating children with disabilities in regular
 21 education classrooms. *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H.*, 14 F.3d
 22 1398, 1403 (9th Cir. 1994) (citations omitted). A four-factor balancing test is used to determine the
 23 appropriate placement for a child with disabilities. *Id.* at 1404. The four factors the court considers
 24 are: “(1) the educational benefits of placement full-time in a regular class; (2) the non-academic
 25 benefits of such placement; (3) the effect [the student] had on the teacher and children in the

1 regular class; and (4) the costs of mainstreaming [the student].” *Id.* at 1404. In this case, the
2 parties agree that cost is not an issue.

3 As previously mentioned, WCSD’s April 5, 2006, proposed IEP provides that Stevie would
4 receive his math instruction in the special education environment. (Admin. R. at 918, 1641-1667.)
5 The SRO applied the *Rachel H.* factors in making his decision. The SRO first noted that Stevie’s
6 progress with his math goals has been minimal and not meaningful. *Id.* at 1917. Applying the
7 *Rachel. H.* test, the SRO noted that Stevie “has a wealth of opportunities for regular education
8 classes and other activities throughout the day to obtain the non-academic benefits of interaction of
9 other children who are not disabled.” *Id.* at 1919. Thus, the SRO did not weigh the non-academic
10 benefits Stevie would receive in the regular education environment as heavily in his analysis. *Id.*
11 The SRO further found that the only possible disruption Stevie’s presence would have related to the
12 implementation of his direct instruction as such instruction may be distracting to the teacher and
13 other students. *Id.* However, the SRO stated that whether such activities would be disruptive was
14 not a significant factor used in this case. *Id.* Finally, the SRO concluded that the educational
15 benefits available to Stevie in the math resource room outweigh the educational benefits to him
16 through embedded activities in the general education environment. *Id.* at 1920-21.

17 Plaintiffs challenge the SRO’s application of the *Rachel. H.* factors. With respect to the
18 first factor, educational benefits, Plaintiffs argue Stevie will receive more educational benefit from
19 the regular education classes than he is likely to receive if placed in a special education resource
20 room. Specifically, Plaintiffs argue Stevie has received an educational benefit from placement in
21 the general education environment. Although Plaintiffs have failed to cite to any evidence to
22 support their position, they do, in part, rely on progress reports indicating that Stevie had either met
23 or was making progress on his goals and objectives. Plaintiffs further argue that Stevie will receive
24 an educational benefit once an overall program of instruction is carefully designed. Finally,
25 Plaintiffs argue, again without citing any evidence, that Stevie would not receive an educational

1 benefit from the special education resource room. WCSD, on the other hand, argues the SRO
2 appropriately balanced the *Rachel H.* factors. WCSD argues that the evidence shows Stevie will
3 not receive a satisfactory education in the general education environment.

4 The court finds that a preponderance of evidence supports the SRO's finding that the
5 educational benefits available to Stevie in the math resource room outweigh the educational
6 benefits to him through embedded activities in the general education environment. Jill Barlow
7 ("Barlow"), the WCSD autism specialist assigned to Stevie, testified that the school district has
8 previously attempted to meet Stevie's math goals and objectives through other classes in his
9 schedule. (Admin. R. at 554:21-555:5, 558:18-22.) Nevertheless, Barlow testified that educating
10 Stevie in that environment had not allowed Stevie to make meaningful gains in this area. *Id.* at
11 555:5-6. Thus, Barlow opined that Stevie needs a setting where he can have direct instruction from
12 a classroom teacher. *Id.* at 553:11-14. Barlow further testified that this instruction probably needs
13 to be in a smaller setting that would allow Stevie an opportunity to be given verbal instruction from
14 an adult. *Id.* at 553:15-19, 558:2-9. Thus, the evidence provided to the court demonstrates that
15 Stevie has not been able to make meaningful gains in the regular education environment and needs
16 to be in a smaller setting where he can receive verbal instruction. As Plaintiffs have not provided
17 the court with any rebuttal evidence, the court agrees with the HO and SRO that this factor weighs
18 in favor of the special education resource room.

19 The second *Rachel. H.* factor requires the court to look at the non-academic benefits of the
20 placement. 14 F.3d at 1404. As previously mentioned, the SRO did not weigh this factor heavily
21 because Stevie has other opportunity for regular education classes and to interact with non-disabled
22 children. (Admin. R. at 1919.) Plaintiffs argue that the SRO erred in giving less weight to the non-
23 academic factor. WCSD disagrees with Plaintiffs arguing that the SRO gave appropriate weight to
24 this factor.

25 The court finds no error in the SRO's decision to give the second *Rachel. H.* factor less
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1 weight. Both parties agree on the importance of Stevie reaching his goals. Furthermore, as noted
2 by the SRO, Stevie has opportunities during the day to interact with non-disabled children in the
3 regular education environment. Plaintiffs have presented no evidence to the court showing what
4 additional non-academic benefit Stevie would receive from having his math instruction in the
5 general education environment. Thus, the court finds no error in giving the academic benefit factor
6 more weight under the circumstances of this case.

7 The final *Rachel H.* factor relevant to this case requires the court to consider the effect
8 Stevie has on the teacher and children in the regular education environment. 14 F.3d at 1404. The
9 SRO found that the only possible disruption Stevie's presence would have related to the
10 implementation of his direct instruction as such instruction may be distracting to the teacher and
11 other students. (Admin. R. at 1919.) Nevertheless, the SRO stated that whether such activities
12 would be disruptive was not a significant factor used in this case. *Id.* Plaintiffs argue that this
13 factor weighs in favor of including Stevie in the regular education environment. Defendants
14 contend that the SRO appropriately considered this factor.

15 Plaintiffs have presented evidence that Stevie did not cause disruptions in class. *Id.* at
16 206:10-12. However, WCSD has pointed out evidence indicating the intensive instruction Stevie
17 requires to obtain his math skills can be disruptive. *Id.* at 553:20-25. Thus, the evidence supports
18 the SRO's decision.

19 In looking at all the *Rachel H.* factors, the court finds the SRO appropriately considered the
20 evidence and weighed the factors. Plaintiffs have failed to meet their burden of showing a violation
21 of IDEA's LRE mandate. As a result, the SRO's decision as to the appropriate placement for
22 Stevie will be affirmed.

23 **B. Assistive Technology Devices**

24 **1. Prevailing Party Status**

25 WCSD filed a cross-appeal challenging the SRO's decision requiring the school district to

1 specifically identify the assistive technology devices (“ATDs”) in Stevie’s proposed IEP. Although
 2 the SRO found a violation, the SRO also concluded that this error did not rise to the level of
 3 denying Stevie a FAPE. *Id.* Because the SRO found no denial of FAPE, WCSD argues that
 4 Plaintiffs cannot be designated a prevailing party entitled to recover attorney’s fees. Plaintiffs
 5 respond, in part, by arguing that it is premature to determine whether they are entitled to prevailing
 6 party status and an award of attorney’s fees and costs. The court agrees. The issue of whether
 7 Plaintiffs are the prevailing party is appropriately determined if a motion for attorney’s fees and
 8 costs is filed. *See* 20 U.S.C. § 1415(i)(3)(B) (permitting an award of attorney’s fees as part of the
 9 costs to a prevailing party.).

10 **2. Evidentiary Rulings and Motion to Strike**

11 WCSD next challenges the HO’s decision preventing WCSD from introducing evidence of
 12 proposed language describing ATDs and services offered to Plaintiffs during the resolution process.
 13 WCSD has attached the evidence that was excluded by the HO as an exhibit. Plaintiffs argue that
 14 the HO and SRO properly excluded evidence regarding negotiations.⁴

15 20 U.S.C. § 1415(i)(2)(C)(ii) requires the court to “hear additional evidence at the request
 16 of a party” in any action seeking judicial review of an administrative decision. The Ninth Circuit
 17 has construed the word “additional” to mean supplemental. *Jackson*, 4 F.3d at 1472-73. Therefore,
 18 section 1415(i)(2)(C)(ii) “does not authorize witnesses at trial to repeat or embellish their prior
 19 administrative hearing testimony.” *Id.* at 1473. Reasons for supplementing the record “might
 20 include gaps in the administrative transcript owing to mechanical failure, unavailability of a
 21 witness, an improper exclusion of evidence by the administrative agency, and evidence concerning
 22 relevant events occurring subsequent to the administrative hearing.” *Id.* The party requesting to
 23 supplement the record must provide a solid justification for admitting the additional evidence. *E.S.*

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 25 ⁴Plaintiffs also argue that the failure to adequately describe the ATDs denied Stevie a FAPE. As
 26 previously mentioned, the SRO found no denial of FAPE. Because Plaintiffs have not appealed this portion
 of the SRO’s decision, the issue is not properly before the court.

1 *v. Indep. Sch. Dist., No. 196 Rosemount-Apple Valley*, 135 F.3d 566, 569 (8th Cir. 1998); *Brandon*
 2 *H. ex rel. Richard H. v. Kennewick Sch. Dist. No. 17*, 82 F.Supp.2d 1174 (E.D. Wash. 2000).

3 As WCSD is arguing the HO and SRO erred in omitted evidence from the resolution
 4 process, § 1415(i)(2)(C)(ii) governs the issue.⁵ During the due process hearing, WCSD offered
 5 evidence with regard to language it had proposed to Plaintiffs to describe the ATDs. (Admin. R. at
 6 1905.) Plaintiffs objected to the evidence arguing that it constituted settlement negotiations. *Id.*
 7 The HO determined that the evidence should be barred under Section 48.105 of the Nevada
 8 Revised Statutes. *Id.* The SRO upheld the ruling. The SRO based his decision on the strong
 9 policy underlying the resolution process to resolve disputes. *Id.* at 1906.

10 Pursuant to § 1415(f)(1)(B) of IDEA, the parties to a dispute must convene a meeting to
 11 discuss the resolution of the complaint. 20 U.S.C. § 1415(f)(1)(B). WCSD argues that §
 12 1415(f)(1)(B) does not require the mandatory resolution session to be treated as confidential in any
 13 future proceeding.

14 Upon carefully considering the parties' points and authorities, the court will not allow any
 15 additional evidence in reviewing the decision of the SRO. WCSD has failed to present a solid
 16 justification for admitting the evidence. Even if such evidence were permissible, a decision the
 17 court need not make, WCSD has failed to demonstrate how such evidence supports the conclusion
 18 that there was no violation of IDEA. WCSD focuses its discussion on whether such evidence is
 19 admissible without addressing the import of such evidence. Without any discussion of the
 20 evidence, WCSD cannot meet its burden of showing error in the SRO's opinion.

21 Although the court will not consider the additional evidence, the court finds Plaintiffs'
 22 motion to strike unwarranted. Such evidence was appropriately filed with this court to allow for
 23 review in the event it was to be considered. *See* 20 U.S.C. § 1415(i)(2)(C)(ii).

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25 ⁵The documents submitted by WCSD were excluded from evidence at the administrative level and thus
 26 did not form part of the administrative record.

1 **C. The Behavior Intervention Plan**

2 The final issue the court must decide is whether the proposed April 2006 IEP adequately
3 considers positive behavioral interventions, supports, and other strategies to address Stevie's
4 behavior. The HO found that Stevie had no behavioral problems which might interfere with his
5 learning or the learning of others in the classroom. (Admin. R. at 1922.) The SRO reversed the
6 HO finding that a preponderance of the evidence shows that Stevie does, in fact, have such
7 behavioral problems. The SRO noted that language in the proposed IEP "touches upon" Stevie's
8 behavioral needs. *Id.* at 1927. However, the SRO further stated that "these provisions do not set
9 forth as IDEA requires all the various interventions, supports, and strategies deemed necessary to
10 address the [Stevie's] behaviors that impede his learning or that of other children." *Id.* Thus, the
11 SRO found this failure to be a violation of IDEA. *Id.* at 1928. To remedy this violation, the SRO
12 ordered WCSD to include Stevie's BIP as part of his IEP.

13 WCSD challenges the SRO's decision arguing the proposed April 2006 IEP specifically
14 addressed Stevie's behavior and provided his educational team with the necessary positive
15 behavioral supports and strategies required. Plaintiffs disagree and argue the proposed IEP fails to
16 comply with IDEA. Alternatively, Plaintiffs argue the Nevada Administrative Code requires that a
17 BIP be included in an IEP.

18 A BIP is not a procedural requirement for an IEP. There is no provision in IDEA requiring
19 the BIP to be included in the IEP. Section 1414(d)(3)(B)(i) provides, however, that the IEP team
20 shall "in the case of a child whose behavior impedes the child's learning or that of others, consider
21 the use of positive behavioral interventions and supports, and other strategies to address that
22 behavior." 20 U.S.C. § 1414(d)(3)(B)(I).

23 This court agrees with the SRO that the provisions of the proposed IEP do not set forth all
24 the various interventions, supports, and strategies deemed necessary to address Stevie's behaviors
25 that impede his learning or that of other children. Stevie's BIPs dated January 19, 2005, and

1 April 20, 2005, indicate that Stevie's behavioral problems include yelling, crying and biting.
2 (Admin. R. at 1523, 1668.) The proposed April 2006 IEP does mention the fact Stevie has
3 behavioral problems. One goal listed in the IEP is for Stevie "to demonstrate appropriate behavior
4 when frustrated or angry as measured by observation, data collection and demonstrated by mastery
5 of" his other objectives. (Admin. R. at 1657.) The proposed IEP sets forth a benchmark for Stevie
6 to "self-manage his anger to the extent of not using physical aggressive force on adults during
7 100% of his interactions." *Id.* With respect to supplementary aids and services, the IEP provides
8 for the "[u]se of a calm voice to ask Stevie to use his words & to direct him to use AT device" and
9 for a "Positive Behavior Support Plan." *Id.* at 1662. The IEP further provides for the use of "social
10 stories." *Id.* at 1663.

11 This language in the proposed IEP does not show that the IEP team considered the use of
12 positive behavioral interventions and supports, and other strategies to address Stevie's specific
13 behavioral problems. 20 U.S.C. § 1414(d)(3)(B)(i). It is not clear whether the IEP team considered
14 each of Stevie's behavioral problems. Because, the IEP did not adequately consider the use of
15 positive behavioral interventions and supports, and other strategies to address Stevie's behavioral
16 problems, the SRO ordered WCSD to include the BIP as part of the proposed IEP. The court defers
17 to the decision of the SRO as a reasonable method to resolve the deficiency of the proposed IEP.
18 Thus, the court finds WCSD has failed to meet its burden of showing an error in the SRO's
19 opinion.

20 IT IS THEREFORE ORDERED that Plaintiff's Appeal (# 1) is hereby DENIED.

21 IT IS FURTHER ORDERED that WCSD's Cross-Appeal (# 10) is hereby DENIED. The
22 final decision of the State Review Officer is AFFIRMED.

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1 IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike (# 46) is hereby DENIED.

2 IT IS SO ORDERED.

3 DATED this 27th day of August, 2008.



6 LARRY R. HICKS
7 UNITED STATES DISTRICT JUDGE

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